SUNSEEKERS PTE. LTD.

v.

JSH JOSHUA

HIGH COURT, SINGAPORE
CHAN SEK KEONG J
[SUIT NO. 1429 OF 1983]
27 FEBRUARY 1990

CIVIL PROCEDURE: *Granting of mareva injunction - Discharge of - Damages as a consequence - Measure of damages - Casual link between injunction and damages - Remoteness of damages.*

EVIDENCE: *Admissibility of evidence - Hearsay - Oral and documentary.*

The plaintiffs were carrying on the business of travel agents in Sri Lanka. The defendant was a director of a company called Sunna Travel Ltd. ("Sunna"), who were travel agents.

This action was commenced on 29 March 1983 by the plaintiffs to recover from the defendant the sum of S$10,000 being the proceeds of a cheque which had been paid on 4 March 1983 into the defendant's joint account with his wife in the Hong Kong and Shanghai Bank, Serangoon Garden Way Branch (HKSB). The plaintiff alleged that the cheque had been stolen from them. The mareva injunction was served on HKSB on 11 April 1983, which continued until 19 August 1983.

In his defence filed on 13 August 1983, the defendant denied the allegation in the statement of claim and alleged that the cheque was made out in his name and delivered by the plaintiffs to him as a director of Sunna as security for the indebtedness of the plaintiffs to Sunna, and that it was made out in that way because Sunna had no bank account in Singapore, and that when the plaintiffs failed to settle their indebtedness, he handed the cheque to his wife to pay it into their joint account in Singapore. Two affidavits were filed on 2 September 1983 and a further affidavit was filed on 7 February 1984. After that the action went into deep slumber until 30 April 1988 when the defendant's solicitors filed a notice of motion to discharge the injunction and dismiss the action for want of prosecution. On 13 May 1988 an order in the terms of the notice of motion was made which included an order that there be an inquiry as to damages.

At the inquiry held before the Assistant Registrar the defendant gave evidence and upon these evidence the Assistant Registrar assessed damages in the sum of R141,350 and £2593.28.

The plaintiffs now appealed against the decision of the Assistant Registrar. Counsel for the plaintiffs has raised four grounds of appeal. The first is that the defendant's failure to perform the supply contract timeously was not caused by the injunction because the defendant did not rely and could not have relied on the use of the S$10,000. The second ground is that the alleged damage was too remote as the plaintiffs could not have contemplated the existence of the supply contract. The third is that alleged damages has not been proved by admissible evidence, and the fourth ground is that the expenses incurred were not damages but costs in defending the action should be taxed as costs.

Held:

[1] There is conclusive evidence in the Court file that the defendant's failure to perform the supply contract was not caused by the injunction. The facts demonstrated that the defendant

was a man of substance and that his allegation that he had to rely on the S$10,000 to fulfil the supply contract should have been viewed with great suspicion. The entire story of the defendant about his reliance on the S$10,000 and the necessity created by the injunction of his wife having to raise funds in London was a fairy tale.

[2] The alleged damage suffered by the defendant was obviously too remote. The plaintiffs could not have foreseen that the S$10,000 which was meant for Sunna would have (i) become vested in the defendant, (ii) that the defendant would have the supply contract and (iii) he would need the S$10,000 to fulfil that contract.

[3] On the evidentiary issues, the Assistant Registrar did not seem to have given any consideration to the arguments of the plaintiffs on the inadmissibility of some of the evidence adduced by the defendant and he appeared to have accepted wholly the oral testimony of the defendant without considering their intrinsic improbability in the circumstances of the evidence known to him. He admitted not only oral hearsay evidence but also documentary hearsay evidence over the objections of the plaintiffs.

[4] All the expenses incurred by the defendant for which the Assistant Registrar has awarded to him as damages were in the nature of costs incurred in discharging the injunction and in defending the action. They were not damages sustained by reason of the injunction. They should be taxed as part of the party costs payable to him.

[5] If damage is suffered because of the grant of the injunction, and would not have been suffered but for it, then the Court should compensate a defendant who claims damages under the undertaking. Its grant must be shown to be causa sine qua non of the damage complained of before the defendant can be entitled to be compensated for what turns out to be the erroneous grant by the Court of the injunction against it. Only then will the defendant have suffered from the grant of the injunction.

[6] Appeal allowed with costs here and below and the order of the Assistant Registrar to be set aside.

[Appeal allowed.]

Cases referred to:
Smith v. Day [1882] Ch D 421
Air Express v. Ansett Transport Industries (Operations) Pty. Ltd. [1979-81] 146 CLR 249

For the applicants/plaintiffs - NK Raja
For the respondent/defendant - Deborah, Barker

JUDGMENT

Chan Sek Keong J:

This appeal concerns the damages, if any, payable to the defendant by the plaintiffs on their undertaking to pay damages given to the Court when it granted a Mareva injunction on 31 March 1983 restraining the defendant from disposing of certain funds in his bank account in Singapore.

The plaintiffs were carrying on the business of travel agents in Sri Lanka. The defendant was a director of a company called Sunna Travel Ltd. ("Sunna"), who were travel agents.

This action was commenced on 29 March 1983 by the plaintiffs to recover from the defendant the sum of S$10,000 being the proceeds of a cheque which had been paid on 4 March 1983 into the defendant's joint account with his wife in the Hongkong and Shanghai Bank, Serangoon Garden Way Branch ("HKSB"). The plaintiffs alleged that the cheque had been stolen from them. The Mareva injunction was served on HKSB on 11 April 1983.

On the first return date for the continuation of the injunction, 26 May 1983, the injunction was continued until 8 July 1983 when it was again continued until 29 July 1983. The defendant then entered appearance on 19 July 1983. On the return date on 29 July 1983, the injunction was, by consent of the parties, continued until 19 August 1983.

In his defence filed on 13 August 1983, the defendant denied the allegations in the statement of claim and alleged that the cheque was made out in his name and delivered by the plaintiffs to him as a director of Sunna as security for the indebtedness of the plaintiffs to Sunna, and that it was made out in that way because Sunna had no bank account in Singapore, and that when the plaintiffs failed to settle their indebtedness, he handed the cheque to his wife to pay it into their joint account in Singapore. On 2 September 1983, two affidavits were filed on behalf of the defendant, both sworn on 24 August 1983, one by the defendant and the other by one Fonseka who was formerly employed as an accountant by Sunna. A further affidavit sworn by the defendant on 17 January 1984 was filed on 7 February 1984. After that the action went into deep slumber until 30 April 1988 when the defendant's solicitors filed a notice of motion to discharge the injunction and dismiss the action for want of prosecution. On 13 May 1988, I made an order in terms of the notice of motion which included an order that there be an inquiry as to damages.

At the inquiry held before the Assistant Registrar, the defendant gave evidence. His evidence was as follows: that as soon as he was notified of the injunction, he consulted legal advisers in Sri Lanka, England and Singapore with a view to lifting the injunction, that he was the beneficial owner of the cheque as he had already paid Sunna the amount owing by the plaintiffs, that at the material time, he had a contract ("the supply contract") to supply, by 3 April 1983, lighting equipment to the Ceylon Supply and Development Co. Ltd. ("CSD"), a Sri Lankan company, at the price of R155,000, that the supply contract provided payment of a penalty of R600 per day and liquidated damages of R25,000 per week of delay in completion, that it was his intention to use the $10,000 to buy the equipment from Hong Kong (for which he had obtained from the supplier a quotation and a pro-forma invoice dated 10 February 1983) at the price of HK$36,699.28 = R131,750.42, that he could not effect the purchase by reason of the injunction, that he had to buy the said equipment later on 18 April 1983 in Colombo at the price of R186,000 (for which he produced a delivery order and a cash memo both dated 18 April 1983), after his wife had to fly all the way to London to raise, successfully, the money he needed to perform the supply contract, that he had to pay liquidated damages to CSD for late performance and that as a result, he had suffered loss and damages and incurred considerable expenses in obtaining legal and other professional advice in preparing his defence. He produced some documents to substantiate some of these expenses.

On the above testimony and the said documents, the Assistant Registrar assessed damages in the sum of R141,350 and £2593.28 made up as follows:

(1) R23,250 being the difference in the cost of goods from the Hong Kong supplier and the Colombo supplier.

(2) R50,000 as liquidated damages for delay in fulfilling the supply contract.

(3) R23,250 as loss of profit on the supply contract.

(4) R45,500 being telephone/telex charges incurred in Colombo.

(5) R18,600 being travelling expenses of wife to London.

(6) R14,000 being legal expenses incurred in Colombo.

(7) £492.50 being telephone/telex charges incurred in London.

(8) £350 being professional charges of Fonseka.

(9) £22.75 being courier fees for affidavits.

(10) £1,729.03 being fees of London solicitors.

The plaintiffs have now appealed against the decision of the Assistant Registrar. In his Grounds of Decision, the Assistant Registrar appeared to have accepted the principle governing the measure of damages as stated by Cotton LJ in *Smith v. Day* [1882] Ch D 421 at p. 430 as follows:

> ... the damages must be confined to loss which is the natural consequence of the injunction under the circumstances of which the party obtaining the injunction has notice

The Assistant Registrar also asked himself the question what a "reasonable person would have contemplated as the natural and probable result of the damage suffered by the victim if the injunction was discharged ...". By awarding the damages aforesaid, the Assistant Registrar found that they were reasonably contemplated by the plaintiffs.

Counsel for the plaintiffs has raised four grounds of appeal. The first is that the defendant's failure to perform the supply contract timeously was not caused by the injunction because the defendant did not rely and could not have relied on the use of the S$10,000. The second ground is that the alleged damage was too remote as the plaintiffs could not have contemplated the existence of the supply contract. The third is that alleged damage has not been proved by admissible evidence, and the fourth ground is that the expenses incurred were not damages but costs in defending the action should be taxed as costs.

Causation

The first ground of appeal concerns causation. The plaintiffs' undertaking to the Court was "to abide by any Order of Court ... as to damages in case the Court ... should be of the opinion that the defendant herein shall have sustained and by reason of this order which the plaintiff ought to pay". This is a common form of undertaking given in respect of every injunction pending trial of the action. The words "by reason of" mean that there must a causal link between the injunction and the damage suffered by him. The onus of proof is on the defendant: see *Air Express v. Ansett Transport Industries (Operations) Pty. Ltd.* [1979-81] 146 CLR 249. In that case, the appellants/2nd defendants had applied for damages pursuant to an undertaking as to damages in the usual terms given to the Court by the respondents/ plaintiffs to restrain the 1st defendants, *viz*., the Commonwealth and the Secretary of the Department of Transport, from issuing permission to the appellants and another company under customs regulations to import freighter aircraft into Australia. The injunction and the undertaking continued until the action was determined in the defendants' favour. The inquiry on damages was held before Aickin J who found that it was probable that one the action was commenced the secretary of state would not have issued the permission, and hence the appellants had not established that the loss they incurred from their inability to import the aircraft flowed from the grant of the injunction. In other words, the loss flowed from the litigation itself and not from the injunction. Accordingly, his Honour found that the appellants had not suffered any damage by reason of the injunction.

On appeal, the High Court, by a majority of four to one, held that there was no ground for interfering with the decision, and unanimously upheld the distinction between damage caused by the grant of an injunction and damage caused by the fact of litigation and that damages were recoverable only in the former instance. Stephen J. stated the law in these words:

Perhaps the first point to be observed is that undertakings such as this are given to the court and not to the party enjoined. .. ... A claimant under an undertaking cannot complain of any breach of contract nor of any breach of duty, tortious or otherwise, owed to him, nor, of course, of any breach of the undertaking. What occurs when such an undertaking is extracted from a plaintiff is that the Court, as a condition of its grant of interim or interlocutory injunctive relief, has ensured that, should it turn out that that relief should never have been granted, it will have the power, so far as monetary compensation allows, to make good the harm which the grant has done to the defendant. The Court acquires powers to do justice between the parties which it would not otherwise possess. ... ...

Damages awarded under such an undertaking are, therefore, of a rather different nature from those awarded at common law. Their special character appears from the fact that their source lies, in the plaintiff's own voluntary undertaking, given as the price of obtaining an injunction. It may also be seen in the words of the common form of the undertaking, they must not only be sustained by reason of the grant of the injunction but the Court must form the opinion that the plaintiff "ought to pay" them. It was in the context of such an undertaking that, in *Finnigan's* case, Cussen J said:

> I think the terms of the undertaking are themselves of importance. It provides that there may be an order as to damages if the Court shall be of opinion that the defendant has sustained any. I think the word 'damages' in that undertaking is to be given a very general meaning, and is not necessarily to be given the same meaning as the word 'damages' when used in connection with breaches of contracts. 'Damages' in this case seems to me to mean real harm, rather than to have any strictly defined meaning.

It is appropriate enough, in claims under such undertakings, to rely upon analogies drawn from the common law in matters of remoteness of damages, the concern of Brett LJ. in *Smith v. Day*, as Lindley LJ. points out in *Schlesinger v. Bedford.* It is quite a different thing to seek to apply common law rules of causation to a claim made under such undertaking; there is no such analogy as Lord Reid in *Baker v. Willoughby* found to exist in the case of workers' compensation. The reason for this is plain enough. In both contract and tort it is enough that the breach of contract or of duty is one direct cause of whatever damage a plaintiff has suffered - McGregor on Damages, 13th ed. (1972), pp. 69, 118. The breach is a wrongful act on the defendant's part and the common law visits him with liability for the consequences to the plaintiff, subject always to rules as to remoteness. But a plaintiff who sues for an injunction and obtains interlocutory relief, giving an undertaking to the court as the price of that relief, commits no wrongful act, no breach of contract or of duty when, at the trial, he fails to obtain any perpetual injunction. If, as a result of the grant of interlocutory relief, the defendant has been harmed there will, however, have been injustice and, an undertaking having been given, the court will thereby have been armed with jurisdiction, otherwise lacking, to right that injustice and compensate the defendant for the harm done to him.

From this it can be seen that it will only be if damage is suffered because of the grant of the injunction, and would not have been suffered but for it, that the Court should compensate a defendant who claims damages under the undertaking. Its grant must be shown to be causa sine qua non of the damage complained of before the defendant can be entitled to be compensated for what turns out to be the erroneous grant by the Court of the injunction against it. Only then will the defendant have suffered, from the grant of the injunction, such "real harm" as Cussen J. Spoke of in *Finnigan's* case what North J., in *Attorney-General v. Albany Hotel Co.* described as "the damages which were really sustained".

It follows that it is for the claimant under an undertaking to establish by evidence, or by inference from evidence, a *prima facie* case both that the grant of the injunction was a cause of his damage and that but for it he would not have suffered that damage.

In this case, although Counsel for the plaintiffs submitted before the Assistant Registrar that the defendant's loss was not occasioned by the injunction, the Assistant Registrar did not appear to have considered this argument. Instead, he merely decided that the loss and damage was the natural and probable result of the injunction. If, in fact, there was no evidence to suggest that the defendant had intended to rely on the S$10,000 to perform the supply contract, then his failure to perform it timeously could not have been due to the grant of the injunction.

It is therefore necessary for me to review the evidence to determine whether there was a causal link between the damage and the injunction. The defendant had been paid 25% of the contract price before the date of the injunction. He thus needed less than 75% of that price to purchase the equipment from Hong Kong and deliver it by 3 April 1983. He alleged that he had relied on the S$10,000 (which by coincidence was equivalent to R155,000, according to the defendant) to perform the supply contract. What were his financial resources at that time? In his affidavit sworn on 17 January 1984, the defendant deposed that he was resident in London and that he had the following assets:

(1) a house at No. 6 Sunnyside Road, Ealing (valued at £65,000),

(2) a house at No. 8 Sunnyside Road, Ealing (valued at £55,000),

(3) a house at No. 8417, Lurline Avenue, Woodlands Hill, California, USA (valued at US$90,000),

(4) a house at No. 15/1 Beach Road, Sri Lanka, Mt. Lavinia (valued at R1,250,000),

(5) a majority shareholding in £300,000 public company,

(6) a shareholding worth £5000 in a London travel company,

(7) £17,500 in a joint account with the Bank of Ceylon, London.

The defendant did not allege that he had acquired all these assets between April 1983 and January 1984, and the probability must be he had these assets in April 1983. Furthermore, he has also produced in the evidence receipts showing that he had incurred (i) R71,500 for two first class air tickets (Colombo/London) in March/May 1983, (ii) £850 for one air ticket (London/Singapore/London) in April 1984 and (iii) £1,954 for one air ticket (London/Colombo/London) in July 1984. These facts demonstrate that the defendant was a man of substance and that his allegation that he had to rely on the S$10,000 to fulfil the supply contract should have been viewed with great suspicion.

The supply contract was made on 6 February 1983. His wife paid in the cheque on 23 March 1983. Between 23 March 1983 and until the date of the injunction (i.e., 31 March 1983), he could have used the S$10,000 to purchase the equipment from Hong Kong. He did not do so. Moreover, he admitted that he had not accepted the quotation of the Hong Kong supplier, and gave as his explanations that he intended to fly to Hong Kong to arrange for shipment. Was this explanation credible? In my view, it was highly improbable as the Hong Kong supplier's quotation included the cost of airfreight to Sri Lanka and there was no necessity for him to fly to Hong Kong on profit margin he was making from the supply contract. The fact that he had not accepted the quotation of the Hong Kong supplier was some evidence he did not require the S$10,000 as payment to the Hong Kong supplier. Moreover, he had never claimed in any of his affidavits that he paid in the money because he needed it to fulfil the supply contract. The claim was first made in inquiry.

The defendant produced two letters from the CSD dated 4 April 1983 which claimed liquidated damages and 7 April 1983 which referred to the defendant's reply of 5 April 1983 and his "unforseen difficulties". No explanation has been given for the omission to produce the letter of 5 April 1983 which would have shown conclusively what his difficulties were.

In fact, there is conclusive evidence in the Court file that the defendant's failure to perform the supply contract was not caused by the injunction. Unfortunately, Counsel for the plaintiffs failed to bring it to the attention of the Assistant Registrar. The defendant's affidavit sworn on 24 August 1983 disclosed a letter dated 23 April 1983 from HKSB to the defendant addressed to his *Sri Lanka* address, informing the defendant that the plaintiffs had made a police report that the cheque in question was a stolen cheque, that the police had requested that the $10,000 be frozen and that HKSB had *acceded* to the request. On 5 April 1983, the defendant replied to HKSB from *London*. There is also in the Court file an affidavit of service of the injunction on HKSB stating that it was served on 11 April 1983. As a result of the service, HKSB wrote to the defendant on 12 April 1983 at his *London* address informing him, for the first time, of the injunction. This letter must have taken at least 3-4 days to reach the defendant. On 18 April 1983, the defendant was able to purchase the equipment in Colombo which he had delivered to CSD on the same day. These facts can only lead to one conclusion.

The entire story of the defendant about his reliance on the S$10,000 and the necessity created by the injunction of his wife having to raise funds in London (where the wife went on 30 March 1983 before the injunction was obtained) was a fairy tale. The claims for damages should have been dismissed on this ground.

Remoteness of Damage

Even if causation is proved, the defendant has also to prove that the damages were not too remote. Counsel for the defendant conceded that the plaintiffs had no knowledge whatsoever of the existence of the supply contract, but she contended that since the plaintiffs knew that the defendant was a businessman, they should have been put on notice that he might have to rely on the $10,000 in his business transactions. She contended that the rule in *Smith v. Day* was not a rigid rule and relied on a passage in the judgment of Aickin J. (which was affirmed on appeal) in the *AIR Express* case, where (at pp 266-267) his Honour said:

> In a proceeding of an equitable nature it is generally proper to adopt a view which is just and equitable, or fair and reasonable, in all the circumstances rather than to apply a rigid rule. However, the view that damages should be those which flow directly from the injunction and which could have been foreseen when the injunction was granted, is one of which will be just and equitable in the circumstances of most cases and certainly in the present case. No doubt the view as expressed in the two decisions of the Court of Appeal does not constitute a rigid rule and circumstances may sometimes require a different approach. However it will in my opinion be seldom that it will be just or equitable that the unsuccessful plaintiff should bear the burden of damages which were not foreseeable from circumstances known to him at the time.

The submission of Counsel for the defendant is that in this case, the circumstances were such that it is just and equitable that the Court should order the plaintiffs to pay compensation. However, she was unable to point to any such circumstance. I am unable to find any such circumstances that the plaintiffs had made a false police report or commenced a completely unmeritorious action against the defendant. But the action has been dismissed with costs and the defendant could have commenced an action for damages for malicious prosecution. To adopt the words of Aickin J., it will be seldom that it will be just or equitable

that the unsuccessful plaintiff should bear the burden of damages which were not foreseeable from circumstances known to him at the relevant time. The alleged damage suffered by the defendant was obviously too remote. The plaintiffs could not have foreseen that the $10,000 which was meant for Sunna would have (i) become vested in the defendant (assuming this was the legal position since there was no evidence of an assignment of the funds and the plaintiffs did not request the defendant to pay Sunna and acquire the beneficial ownership of the cheque), (ii) that the defendant would have the supply contract and (iii) he would need the $10,000 to fulfil that contract.

The Evidence

In view of my finding on causation, the evidentiary issues have become irrelevant in this appeal. However, I would like to make some observations on this ground of appeal. Firstly, the Assistant Registrar did not seem to have given any consideration to the arguments of Counsel for the plaintiffs on the inadmissibility of some of the evidence adduced by the defendant. Secondly, he appeared to have accepted wholly the oral testimony of the defendant without considering their intrinsic improbability in the circumstances of the evidence known to him. This is regrettable. He admitted not only oral hearsay evidence but also documentary hearsay evidence over the objections of Counsel for the plaintiffs. I will give a few examples. The evidence about the wife going to London to raise funds was hearsay. The wife did not give evidence nor was a single document produced to show how, when, from whom or how much was raised. The evidence that the defendant (and therefore his wife) had permanent home in London was ignored in the assessment of the truthfulness of the defendant's evidence, even if it were admissible as his personal knowledge. The cash memo was not signed by the maker and therefore not admissible without the maker giving evidence that the defendant actually paid the R186,000 and no receipt was tendered.

"Damages" and Costs/Expenses

For the reason I have given, the cost of the wife's flight to London was neither a loss nor an expense which had any connection with the action or the injunction. All the expenses incurred by the defendant for which the Assistant Registrar has awarded to him as damages were in the nature of costs incurred in discharging the injunction and in defending the action. They were not damages sustained by reason of the injunction. They should be taxed as part of the party and party costs payable to him.

For the above reasons, I allow the appeal with costs here and below and set aside the order of the Assistant Registrar.

Also found at [1990] 1 CLJ 1048